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No. 87-2040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MISSOURI, *et al.*,
Petitioners,

vs.

ROCKWOOD SCHOOL DISTRICT, *et al.*,

and

RITENOUR SCHOOL DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

RESPONDENT RITENOUR SCHOOL DISTRICT'S BRIEF IN OPPOSITION

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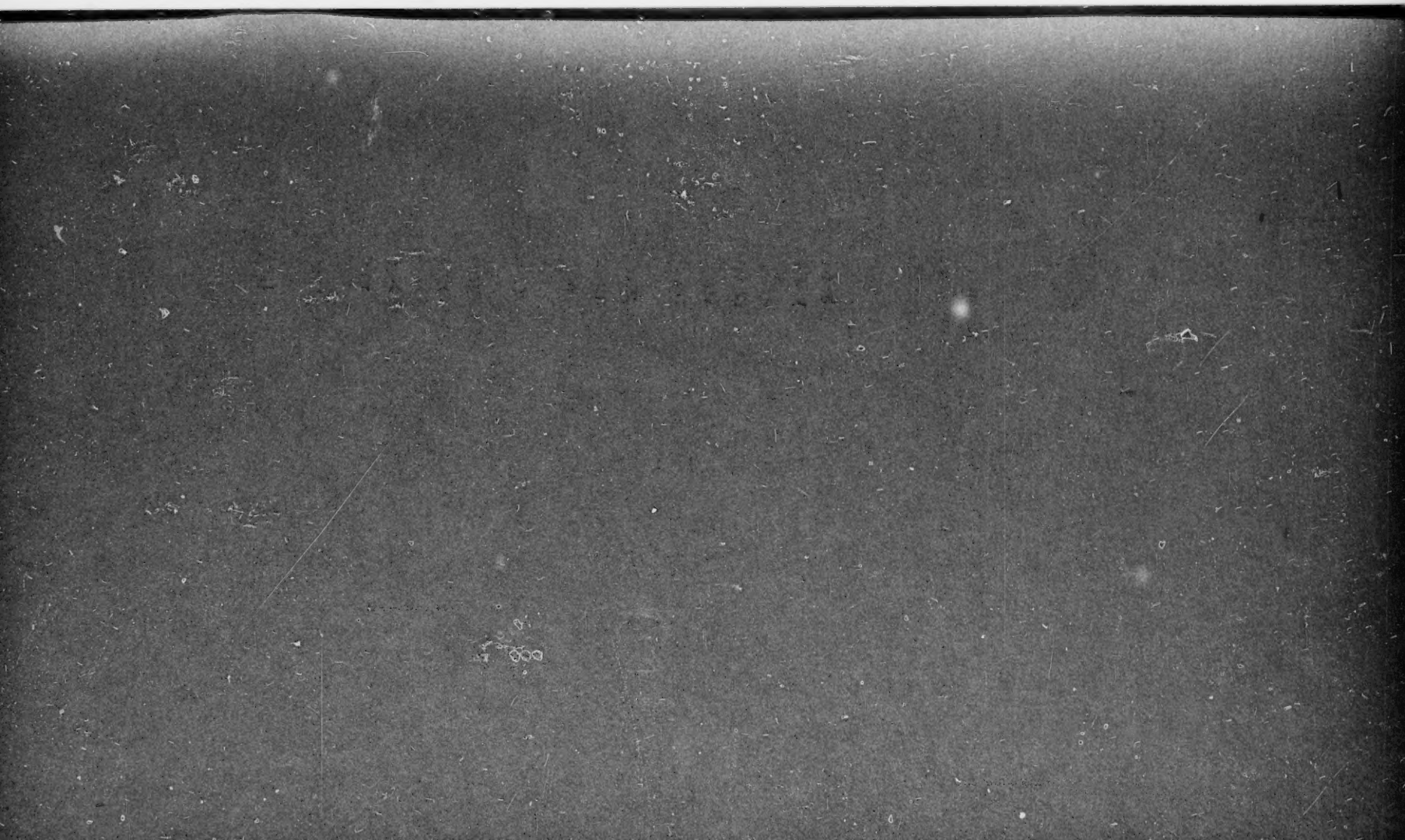

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RESPONDENT RITENOUR SCHOOL DISTRICT'S BRIEF IN OPPOSITION

Respondent Ritenour School District respectfully requests this Court to deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit in this case. The opinion is reported at 839 F.2d 400 (1988).

STATEMENT OF THE CASE

This case arises out of the 16-year old St. Louis school desegregation case. For the fourth time, the State of Missouri ("State") has filed a certiorari petition seeking to challenge its funding obligations under the voluntary interdistrict student transfer program. That program, whereby black students from the City of St. Louis ("City") may elect to attend school in the school districts of St. Louis County ("County"), has for years been an important part of the court-ordered remedy designed to desegregate the City's public schools. The State's challenges to its funding obligations under the voluntary transfer program — including its present challenges predicated on the Eleventh Amendment and notions of federalism and state sovereignty — have been repeatedly made to and rejected by the courts below in prior decisions. The rulings upholding the State's duty to fund the transfer program include three prior decisions by the court of appeals, from each of which the State unsuccessfully petitioned this Court for certiorari review. This circumstance alone justifies denial of the State's present petition (Point III, below).

A review of the earlier rulings by the courts below also demonstrates that the latest twist to the State's Eleventh Amendment argument — that the funding order below is a "naked order to pay" bearing no relationship to "any substantive injunctive relief" (Pet. at 7) — is flatly wrong. The State of Missouri, as "the primary constitutional violator" along with the Board of Education of the City of St. Louis ("City Board"), was and remains under a series of substantive decrees directing implementation of the voluntary City-County student transfer program as an essential element of the remedy to eliminate the vestiges of *de jure* racial discrimination in the City's schools. These orders, originally entered in 1980 after findings of liability, specifically directed the State and City Board to "make every feasible effort" to secure the voluntary

cooperation[1] of the St. Louis County school districts in accepting and educating black City students electing to transfer.

The cost-reimbursement payment the State was directed to make to the Ritenour School District in the decision below was a direct and inevitable consequence of the injunctive orders requiring the State to implement the voluntary transfer program as a part of the St. Louis desegregation remedy. The State's suggestion to this Court that this "is *not* a case about desegregation" (Pet. at 1, emphasis in original) is unsupportable. As will be demonstrated, the assertion that "at no time [has the State] been enjoined to do anything except to pay money" (Pet. at 8) is a grievous mischaracterization of the remedial orders entered in this case. The mischaracterization is a belated[2] and invalid attempt by the State to recast the St. Louis school desegregation case into the mold of *Kelley v. Metropolitan Board of Education of Nashville and Davidson County,* 836 F.2d 986 (6th Cir. 1987), *cert. denied,* 108 S.Ct. 2848 (1988), which involved a fundamentally different situation (Point II, below). The State's funding obligation in the case at bar falls squarely within the facts and holding of *Milliken v. Bradley,* 433 U.S. 267 (1977) ("*Milliken II*") (upholding, against Eleventh Amendment challenges, Michigan's obligation to fund part of the Detroit school desegregation remedy) (Point I, below), as the Eighth Circuit has often expressly held in its prior decisions.

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[1] The County school districts, unlike the State and City Board, are not adjudicated constitutional violators. In fact, as discussed in the text below, nearly all of them have been absolved of any liability for interdistrict school desegregation in final judgments entered by the district court.

[2] *Kelley* had been decided but was not yet reported at the time the Eighth Circuit issued its opinion below. The State first advanced its *Kelley*-inspired "naked order to pay" theory in its unsuccessful motions for rehearing and rehearing en banc. This latest version of the State's Eleventh Amendment argument, which is the basis of the State's present petition, is thus not considered or addressed anywhere in the opinion of the court below. For this further reason, this case is not appropriate for certiorari review.

A.

The Remedial Decrees And Prior Decisions In The St. Louis School Desegregation Case

In February, 1972 a group of black parents (the "Liddell" plaintiffs) filed a class action lawsuit in the United States District Court for the Eastern District of Missouri alleging racial segregation in the St. Louis City public schools in violation of the Fourteenth Amendment. The United States, the NAACP (the "Caldwell" plaintiffs), a white citizens' group (the "Adams" plaintiffs) and other parties were eventually thereafter joined as plaintiffs. By 1977, the defendants named in the case included the State of Missouri, the Commissioner of Education of the State of Missouri, the State of Missouri Board of Education, and the Board of Education of the City of St. Louis. The State defendants and City Board denied any unconstitutional segregation in the City school district and denied responsibility to implement any remedy.

The case proceeded to trial on both liability and remedy. The case was tried to the district court in 13 trial weeks during 1977 and 1978. Based on the voluminous record, and reversing the district court (which had found for defendants), the Eighth Circuit held that the State and City Board were jointly responsible for maintaining a segregated school system in the City of St. Louis. *Adams v. United States,* 620 F.2d 1277 (8th Cir.) (*en banc*), *cert. denied,* 449 U.S. 826 (1980). The court found that the Missouri State Constitution had required separate schools for white and black children until 1976, and that the State had not taken prompt and effective steps to desegregate the City schools after *Brown v. Board of Education,* 347 U.S. 483 (1954). The court also held that City Board's policies and practices since 1956 had contributed to the existing segregation. *Adams,* 620 F.2d at 1287-88. The case was remanded to the district court with instructions to "take those steps necessary to bring about an integrated school system." *Adams,* 620 F.2d at

1295. Notably, for our purposes, the Eighth Circuit explicitly remanded to the district court to "develop[e] and implement[] a comprehensive program of exchanging and transferring students with the suburban school districts of St. Louis County." *Adams,* 620 F.2d at 1296-97. Only the Adams group filed a petition for certiorari in this Court, which was denied.

On remand to the district court, in addition to the existing State defendants (the State, its Commissioner of Education and the State Board of Education), the Governor of Missouri, the Missouri Attorney General and the Missouri State Treasurer were joined as defendants. The district court held on remand as follows:

> [T]he state defendants stand before the Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty. Their efforts to pass the buck among themselves and to other state instrumentalities must be rejected. . . . Since "[t]he primary responsibility for insuring a constitutional structure of public education is the state's, . . . it is appropriate for the Court to order the state" to affirmatively participate in remedial efforts [citations omitted], including the provision of funding, to the extent necessary, for the desegregation efforts ordered by the Court. *See, e.g., Milliken II, supra;* [other citations omitted].
>
> . . . .
>
> . . . The State of Misouri defendants have been found and held liable with the Board of Education of the City of St. Louis for the segregated conditions in the St. Louis public schools. The State should bear an appropriate share of the cost of implementing the Desegregation Plan [citing *Milliken II* and other authorities].

Liddell v. Board of Education, 491 F.Supp 351, 359-60 (E.D. Mo. 1980). The district court further found that the State defendants were

> jointly and severally liable with the defendant Board for the costs pertaining to the Desegregation Plan. The State of Missouri, which prior to 1954 mandated school segregation, never took any effective steps to dismantle the dual system it had compelled by constitution, statutory law, practice, and policy. The State of Missouri is liable for the *de jure* segregation which existed in the St. Louis Public Schools.

Liddell, 491 F.Supp at 357.

Again, notably for our purposes, the district court in paragraph 12 of its decree "Ordered, Adjudged and Decreed that" the State defendants and City Board shall:

> [a] make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis. . . .
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> . . . .
>
> [c] develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necesary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.[3]

Liddell, 491 F.Supp at 353. The district court at this time also confirmed the Desegregation Plan that had been submitted by the City Board. On September 17, 1980 and again on December 19, 1980, the district court reaffirmed its paragraph 12(a) and

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[3] As will be seen, the Eighth Circuit later clarified paragraph 12(c) to be limited to remedying segregation only in the City of St. Louis, inasmuch as the County school districts had never been found liable for school segregation.

12(c) directives to the State and included some additional and amendatory provisions.[4]

The State (and others) appealed to the Eighth Circuit from the district court's orders entered on remand. The State challenged its court-ordered funding obligations and specifically challenged the transfer program provisions of paragraphs 12(a) and 12(c). As to funding, the Eighth Circuit upheld the State's duty to pay based on the "causal relationship between the actions of the State of Missouri and the segregation existing in the St. Louis school system." *Liddell v. Board of Education,* 667 F.2d 643, 654 (8th Cir. 1981) ("*Liddell II*"). Furthermore, the Eighth Circuit observed, the State's funding obligation was specifically decided in *Adams v. United States,* 620 F.2d 1288 (8th Cir. 1980), and "the State has chosen not to seek review of that decision in the Supreme Court." *Liddell II,* 667 F.2d at 654.

With regard to the State's challenges to paragraph 12, the Eighth Circuit stated:

> . . . We take this opportunity to stress the legal obligation of the State of Missouri . . . to develop and implement the plans contemplated by paragraph 12. . . .
>
> . . . .
>
> . . . Paragraphs 12(a)-(c) of the district court's order are salutary remedial directives and are entirely enforceable against the State in the present procedural posture of this lengthy and complicated litigation.

Liddell II, 667 F.2d at 651 n. 6 & 659. As to 12(a), the Eighth Circuit held that "the voluntary exchanges contemplated by section (a) must be viewed as a valid part of the attempt to fashion

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[4] These revised versions of 12(a) and 12(c) are set out at *Liddell v. Board of Education,* 667 F.2d 643, 657-58 (8th Cir. 1981).

a workable remedy within the City." *Id.* at 651. "Section (c) of paragraph 12," the court further held, "is also within the authority of the district court." *Id.* The Eighth Circuit clarified 12(c), however, by noting that the requirement "to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County" must be limited to the City of St. Louis, and is enforceable only against the State and City Board:

> We must read the term "government-imposed" to mean "found to be government-imposed by a court." Therefore, to the extent that the segregation was imposed by County school districts which are not parties to the lawsuit and which have not been designated as constitutional violators, it cannot be considered to be "government-imposed." But, to the extent any such segregation was imposed by the State or other defendants, and to the extent those defendants have the power to remedy the violation, it is proper for the district court to order them to take steps to do so.

Liddell II, 667 F.2d at 651.

On June 17, 1981 the State filed its first certiorari petition in this Court. The petition sought review of both the Eight Circuit's 1980 decision in *Adams* and its 1981 decision in *Liddell II.* The petition (No. 80-2152) included in its list of "Questions Presented" the question whether the State had been properly ordered "to bear the cost of and participate in a plan of voluntary pupil exchanges with non-party school districts?" The petition specifically challenged the State's funding obligations under paragraphs 12(a) and (c) of the district court's order. The State argued, as it does again in the instant petition, that the "order that the State of Missouri fund and participate in a voluntary interdistrict transfer plan would involve a major change in State operations" and is an impermissible attempt "to restructure the operation of both local and state governmental

entities" (Pet. No. 80-2152 at p. 23). This Court denied certiorari on November 30, 1981. 451 U.S. 902.

On July 2, 1981 the district court entered an order authorizing voluntary interdistrict transfers and requiring the State to pay the full cost of these transfers pursuant to paragraph 12(a) of the 1980 Order.[5] The court found that the proposed 12(a) plan was "fair and reasonable" and "conducive to obtaining a proper level of constitutional compliance" and would "aid in eliminating the remaining vestiges of school segregation." Order H(226)81, p. 38. The district court specifically found that the plan met the equitable principles required by this Court in *Milliken II* in that (1) the remedy was related to the condition alleged to offend the constitution, (2) the decree was remedial, i.e., it would tend to restore victims to the position they would have been in absent the constitutional violation, and (3) the remedy properly took into account the interests of the State and local authorities in managing their own affairs. *Milliken II,* 433 U.S. at 280-81.

The State appealed to the Eighth Circuit, arguing that "it cannot be required to pay the costs of implementing a 12(a) plan for voluntary pupil transfers between the city schools and those of St. Louis County." *Liddell v. Board of Education,* 677 F.2d 626, 629 (8th Cir. 1982) ("*Liddell V*"). The Eighth Circuit rejected the contention:

> Paragraph 12(a) was designed to help remedy the proven unconstitutional segregation of the city schools as part of and in conjunction with the overall desegregation plan which we approved in *Liddell II.*
>
> . . . .

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[5] The costs of numerous other remedial duties were allocated one-half to the State and one-half to City Board.

> Paragraph 12(a) is entirely enforceable against the state defendants; they are primary constitutional wrongdoers, and, therefore, can be required to take those actions which will further the desegregation of the city schools even if the actions required will occur outside the boundaries of the city school district. *Hills v. Gautreaux,* 425 U.S. 284 (1976).

Liddell V, 677 F.2d at 629-30 n. 4 & 630. The Eighth Circuit further stated that the State's liability to fund the 12(a) transfers was "settled" and not subject to relitigation:

> We held in *Adams* that the state had substantially contributed to the segregation of the public schools of the City of St. Louis. No appeal was taken from that decision by the state. That decision has been settled and will not be reopened. *See generally United States v. United States Smelting, Refining and Mining co.,* 339 U.S. 186, 198 (1959); 1 B. Moore's Federal Practice ¶ 0.404, p. 401-405 (1980). In addition, we specifically sustained the validity of paragraph 12(a) of the district court's order of May 21, 1980, in our February 13, 1981, decision [*Liddell II*]. The Supreme Court denied certiorari review of that decision on November 30, 1981.

Liddell V, 677 F.2d at 629-30. The Eighth Circuit noted that the State had specifically challenged paragraph 12(a) in its certiorari petition. *Liddell V,* 677 F.2d at 630 n. 5.

Liddell V also reiterated the State's and City Board's obligation to prepare and implement a broader interdistrict desegregation plan as required by paragraph 12(c):

> Paragraph 12(c) permitted the district court to require the defendants who have been adjudged to be constitutional wrongdoers — the State defendants and the City Board — to prepare and submit feasibility plans for interdistrict desegregation involving city and suburban schools in a way that will provide complete and lasting school desegregation.

. . . .

> It is [clear] that the district court can require existing defendants — the state and city school board — to take the actions which will help eradicate the remaining vestiges of the government-imposed school segregation in the city schools, including actions which may involve the voluntary participation of the suburban schools. For example, the district court could . . . require the state to provide additional incentives for voluntary interdistrict transfer. Such relief would not materially affect parties that have not been found constitutionally liable and, hence, would be permissible under paragraph 12(c).
>
> . . . .
>
> To the extent that suburban schools are willing to cooperate, the plans requiring their participation can now go forward.

Liddell V, 677 F.2d at 641-42.

On April 30, 1982 the State filed a petition for certiorari with this Court seeking review of *Liddell V*. The petition (No. 81-2022) suggested in its first "Question Presented" that the interdistrict transfer program impermissibly "would restructure the operation of a state governmental entity." The State reiterated its attack on the district court's 1980 decree "ordering the state to participate in an inter-district remedy" (Pet. No. 81-2022 at p. 10). The State argued that the paragraph 12 funding orders were invalid because they required the State defendants "to substantially alter their governmental structures" (*id.* at p. 12). The State also complained about this Court's prior denial of certiorari (*id.* at pp. 26-27). This Court denied the State's petition on October 4, 1982. 459 U.S. 877.

On March 30, 1983 a proposed agreement with the St. Louis County school districts was submitted to the district court. *See* Pet. Appx. G., "Settlement Agreement," A135 *et. seq.* The

Settlement Agreement was the product of extensive negotiations involving the plaintiffs, City Board, the State of Missouri[6] and all of the 23 school districts in St. Louis County. It was expressly submitted in response to and under the authority of paragraphs 12(a) and 12(c) of the district court's 1980 Order (Pet. Appx. A137, "Purpose") which, as clarified by the Eighth Circuit, required the State and City Board to make "every feasible effort" to secure the cooperation of the County school districts and to implement a program of voluntary City-County student transfers. The Settlement Agreement also served as a settlement of the plaintiffs' recently filed class action claims against the County school district alleging unconstitutional interdistrict school segregation.

Under the terms of the Settlement Agreement, the County school districts agreed to accept and educate black City students voluntarily electing to transfer (*see* Pet. Appx. A138-9 & A146 *et seq.*). Their agreement to do so, however, was contingent upon receiving full reimbursement of their costs, as set forth in Section X, "Finances" (Pet. Appx. A218 *et seq.*). The County districts anticipated that the influx of transfer students would eventually require the reopening of previously closed schools and the construction of additional classroom space in the County. They accordingly insisted upon a provision entitling them to reimbursement of their "one-time extraordinary costs . . . such as costs associated with reopening a closed school" (Pet. Appx. §X.B.3., A220). The Settlement Agreement further provided that litigation of plaintiffs' interdistrict claims would be stayed for five years (or more) and that each County district accepting enough transfer students to reach a pre-set goal would receive a final judgment declaring the district had satisfied its desegregation obligations.

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[6] Although a substantial participant in the negotiations, the State, for reasons of its own, declined to sign the final Settlement Agreement.

The district court, after extensive hearings, approved the Settlement Agreement. The State was ordered to fund 100% of the voluntary transfer program and certain other programs. The State and City Board were ordered to fund equally (50-50) the quality education and capital improvements programs for the City's schools. City Board was ordered to bear certain other costs.

The State appealed, challenging *inter alia* its funding obligations for the transfer program. The Eighth Circuit rejected the arguments for two reasons:

> First, the issue has previously been decided adversely to the State; second, the interdistrict transfers are intrinsic to an effective remedy for the intradistrict violation and are justifed by precedent.

Liddell v. State of Missouri, 731 F.2d 1294, 1302 (8th Cir.) (*Liddell VII*), *cert. denied,* 469 U.S. 816 (1984). As to the former, the opinion observes that "this Court has repeatedly authorized the interdistrict transfer of students as a fundamental element of an effective remedy for the unconstitutional segregation of the city schools." *Id.* at 1302. Retracing at length its prior decisions in *Adams* and the various *Liddell* cases, as well as the same arguments repeated in the State's two prior certiorari petitions, the Eighth Circuit concluded:

> As a result of our previous holdings and of the Supreme Court's inaction, the use of interdistrict transfers is settled as law of the case. . . . In this case, our conclusion that state-funded interdistrict transfers are an appropriate remedy is strengthened by our previous invocation of the law of the case doctrine. *Liddell V, supra,* 677 F.2d at 629-30.

Liddell VII, 731 F.2d at 1304-05.

"Notwithstanding our view that the issues regarding interdistrict transfers have been heretofore decided," the *Liddell VII*

opinion continues, "we again reach the merits of the matter." 731 F.2d at 1305. The opinion then proceeds to analyze at length the requirements of *Milliken II,* including those pertaining to compliance with the Eleventh Amendment, and determines that they are fully satisfied with respect to State funding of the City-County transfer program. 731 F.2d at 1305-08.

Liddell VII specifically addressed and rejected the argument, advanced again by the State in the instant petition, that the funding order forces a "restructuring" of state government and "will compel other budget cuts, which would interfere with the autonomy of state and local governments." 731 F.2d at 1308. The Eighth Circuit reasoned:

> If we accepted this argument, violators of the Constitution could avoid their remedial responsibility through manipulation of their budgets, leaving victims without redress. Simply put, parsimony is no barrier to a constitutional remedy; "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. Memphis,* 373 U.S. 526, 537 (1963).

731 F.2d at 1308.

Most important for our purposes, *Liddell VII* considered and rejected the State's argument that its duty to fund the transfer program violates the Eleventh Amendment. The Eighth Circuit held:

> The district court's funding order poses no Eleventh Amendment problems. The State relies on *Edelman v. Jordan,* 415 U.S. 651, 663 (1974), to avoid its liability for a remedy that requires the expenditure of state funds where that remedy is allegedly overbroad. The Supreme Court in *Milliken II* applied the prospective compliance exception developed in *Ex parte Young,* 209 U.S. 123 (1908), which "permits federal courts to enjoin state officials to conform

> their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Milliken II, supra,* 433 U.S. at 289. After elucidating the three criteria discussed earlier, the Supreme Court in *Milliken II* found that the plan under review there was constitutional. The interdistrict transfer plan under consideration in this case conforms to the same three criteria.

Liddell VII, 731 F.2d at 1308-09 n. 13.

The State filed its third certiorari petition on April 20, 1984, seeking review of *Liddell VII.* There, as here, the State questioned "whether . . . a federal court may require a state to fund a Settlement Agreement drafted by other parties" (Pet. No. 83-1721 at i).[7] There, as here, the State complained that the Settlement Agreement "wrongfully drained state funds. Even more serious, however, is the fact that it seriously distorts the way in which decisions about state programs should be made" (Pet. No. 83-1721 at 23). The State's 1984 petition, like the pending one, complains that the Settlement Agreement was never signed by the State and that it is "a settlement plan imposed by judicial force on a non-settling party" (Pet. No. 83-1721 at 12 & 14). Finally, the State's petition argued that the Eighth Circuit erred in applying the "law of the case" doctrine (Pet. No. 83-1721 at 22 n. 20). This Court denied certiorari on October 1, 1984. 469 U.S. 816.

The voluntary City-County student transfer program has been a highly successful, if not the most successful, element of the St. Louis school desegregation remedy. The Eighth Circuit

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[7] Unlike the instant petition, however, the State's 1984 petition questioned "whether . . . a federal court may require a state to *implement* a multi-district remedy for segregation . . ." (Pet. No. 83-1721 at i). The State's present argument, which contradicts its previous position, is that it has not been ordered to "implement" anything but, rather, is merely subject to a "naked order to pay."

commented in 1984, when it approved the Settlement Agreement, that "the opportunity for effective integration became a reality when the county schools agreed to accept the voluntary transfer of several thousand black students." *Liddell VII,* 731 F.2d at 1306. In 1986 the Eighth Circuit provided an update:

> [S]ignificant progress towards integration has been made. In the school year 1985-86, nearly 7,000 black students from the City of St. Louis attended schools in the suburban schools. Most students who transferred have remained in the school to which they have transferred. Ninety-two percent of them were promoted to the next highest grade in the school that they were attending.

Liddell v. Board of Education, 801 F.2d 278, 280 (8th Cir. 1986) ("*Liddell IX*"). Most recently, in *Liddell v. Board of Education,* ____ F.2d ____ (8th Cir. No. 87-2445, 7/14/88), the court noted that approximately 12,000 black City transfer students are voluntarily enrolled in county schools, and the number is expected to increase in the 1988-89 school year. Sl. Op. at 3. "The high level of city to county transfers has been achieved, even though 26% of the city students transferring to the county are required to spend more than two hours a day on a school bus." *Id.* Citing data, the Eighth Circuit observed that "black parents and black students appear to give strong support to the program" and "black students attending county schools are doing better scholastically than they were before this Court's en banc order of 1983." *Id.* at 4.

As of this writing, 21 of 23 St. Louis County school districts have reached the racial goals required under the Settlement Agreement. These 21 districts, including respondent Ritenour School District, have applied for and received final judgments from the district court declaring satisfaction of their desegrega-

tion obligations.[8] The remaining two districts, with plaintiffs' consent, have been granted a two-year extension to meet their goals and qualify to receive final judgments.

B.

Ritenour's Budget Request And The Decisions Below

Ritenour was compelled to reopen the Buder Elementary School to accommodate the influx of black transfer students to Ritenour under the Settlement Agreement. Buder had previously been closed at a time of reduced enrollment in the district. Pursuant to procedural orders entered by the district court, and X.B.3.'s provision allowing recovery of "the costs associated with reopening a closed school," Ritenour filed a budget request seeking partial reimbursement from the State of the cost of reopening Buder. The budget request was submitted to the Budget Review Committee ("BRC"), a standing committee appointed by the district court in the desegregation case. Pursuant to court order, the State has two permanent voting members on the BRC and the County districts are unrepresented on the committee.

The total estimated cost of reopening Buder was $587,000, an amount conceded by all parties to be "very cost-effective." Ritenour voluntarily limited its budget request to $290,565, however. The BRC recommended that the State pay Ritenour only $108,783 and the district court accepted that recommendation. Ritenour appealed to the Eighth Circuit. The State, which at all times had contended that its funding obligation was negligible or zero, did not appeal.

On appeal, the Eighth Circuit accepted most of Ritenour's arguments regarding financial aspects of the budget request,

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[8] Notwithstanding their final judgments, these districts have continuing obligations under the Settlement Agreement with regard to the recruitment, acceptance and promotion of transfer students. See §XII.D. of the Settlement Agreement (Pet. Appx. A226).

and directed the State to reimburse Ritenour $267,300 for the reopening of Buder. Neither in its appellate brief nor at oral argument did the State make any of the sweeping Eleventh Amendment arguments it now makes in its certiorari petition. The State's sole reference to the Eleventh Amendment pertained to a small group of costs, including expenditures to repair Buder's leaking roof, that Ritenour had incurred prior to submission of its budget request to the BRC. The State's brief argued, in one short paragraph, that such expenditures "constitute[d] a form of retroactive compensation barred by the Eleventh Amendment," citing *Edelman v. Jordan,* 415 U.S. 651, 663 (1974). Until it filed its petition for rehearing, the State at no time suggested that Ritenour's entire budget request and, indeed, all of the State's funding obligations under the Settlement Agreement, violated the Eleventh Amendment.[9]

The Eighth Circuit rejected the State's limited Eleventh Amendment argument:

> The relief in issue here is prospective. The St. Louis school desegregation case is in the remedial stage. The failure of the State to pay Ritenour for the roof repair in question is not a past wrong for which Ritenour is attempting to hold the State liable. Rather, it is a question of what the State must do *now* to conform its actions to the remedial relief

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[9] Prior to its petition for rehearing, the State made no Eleventh Amendment argument at all with respect to Rockwood School District's budget request. As to respondent Rockwood, the decision below neither makes nor affirms any monetary award against the State. It merely holds that the language "one-time extraordinary costs" in X.B.3. does not limit a County school district to one budget request (as the district court had held), and remands to the district court for consideration of and a ruling on Rockwood's second budget request. It should be noted that the State did not appeal the district court's earlier order (in 1984) approving Rockwood's first X.B.3. budget request. The State acquiesced in that ruling and made the payment to Rockwood as directed by the district court.

> already required. Thus, there is no Eleventh Amendment bar to this payment for past roof repairs.

Liddell v. Board of Education, 839 F.2d 400, 404 (8th Cir. 1988) (emphasis in original). The court also noted its prior rejection of the State's Eleventh Amendment argument in *Liddell VII,* 731 F.2d at 1308 n. 13, *cert. denied,* 469 U.S. 816 (1984). *See* 839 F.2d at 404.

The state filed a motion for rehearing and rehearing en banc, raising for the first time in these proceedings the contention that the Eleventh Amendment bars all payments by the State under the Settlement Agreement. Rehearing was denied by the Eighth Circuit on March 14, 1988.

REASONS FOR DENYING THE WRIT

I.

The Decision Below Is Consistent With *Milliken II* And Other Decisions Of This Court

At issue in *Milliken II,* 433 U.S. 267 (1977), as here, was the question whether a state found to be liable in a school desegregation case may be ordered to fund the costs of the remedy without violating the Eleventh Amendment. More specifically, the question was whether the Eleventh Amendment proscribed an order requiring the State of Michigan "to pay about $5,800,000 *to the Detroit School Board.*" *Id.* at 293 (Powell, concurring) (emphasis added). This Court held that requiring Michigan to make such a payment did not violate the Eleventh Amendment.[10]

The only analytical difference between *Milliken II* and the decision below is that the Detroit School Board was an adjudicated constitutional violator (along with the State of Michigan) whereas Ritenour is not. This distinction, however, makes the correctness of the decision below *a fortiori.* Obviously, Ritenour's *lack* of culpability makes the State of Missouri's Eleventh Amendment argument even less tenable than the one made and rejected in *Milliken II.*

This Court's reasoning and holding in *Milliken II* are thus directly in point and fatal to the State's contentions in the petition at bar. *Milliken II* held that state-ordered funding of the remedy in a school desegregation case is necessarily "prospective" and accordingly is not proscribed by the Eleventh Amendment:

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[10] The State of Missouri's argument that the Eleventh Amendment prohibits a court from requiring a state to pay money to one of its own political subdivisions has thus been squarely rejected by this Court. *Milliken II* specifically approved an order requiring the payment of money by Michigan "to the Detroit School Board."

> The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception reaffirmed by *Edelman*. That exception, which had its genesis in *Ex parte Young*, 209 U.S. 123 (1908), permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. 415 U.S. at 667. The order challenged here does no more than that. The decree requires state officials, held responsible for unconstitutional conduct, in findings which are not challenged, to eliminate a *de jure* segregated school system. More precisely, the burden of state officials is set forth in *Swann* — to take the necessary steps "to eliminate from the public schools all vestiges of state-imposed segregation." 401 U.S. at 15. The educational components, which the District Court ordered into effect *prospectively*, are plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual system long maintained by Detroit.
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> . . . That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment.

Milliken II, 433 U.S. at 289-90 (emphasis in original).

The Court emphasized the difference between a school desegregation remedy and a case, like *Edelman*, where individual citizens seek money damages for actions and consequences completed in the past:

> Unlike the award in *Edelman*, the injunction entered here could not instantaneously restore the victims of unlawful conduct to their rightful condition. Thus, the injunction here looks to the future, not simply to presently

> compensating victims for conduct and consequences completed in the past.
>
> . . . .
>
> In contrast to *Edelman,* there was no money award here in favor of respondent Bradley or any members of his class. This case simply does not involve individual citizens' conducting a raid on the state treasury for an accrued monetary liability. The order here is wholly prospective in the same manner that the decree mandates vocational schools and assignments, for example.

Milliken II, 433 U.S. at 290 nn. 21 & 22. The Court also rejected Michigan's arguments, which are parroted in the State's instant petition, that the funding order violated "principles of federalism" and was tantamount to a forced "restructuring" of state governmental entities and their methods of financing. *Id.* at 291.

The principles announced in *Milliken II,* which this Court reaffirmed in *Papasan v. Allain,* 106 S.Ct. 2932, 2942-43 (1986), speak directly to the case at bar. The voluntary City-County transfer program was established, in a variety of past court decisions no longer subject to review, to reduce the ongoing vestiges of discrimination in the City's schools. The program was and remains "prospective" — designed to benefit current and future black City students. The purpose of reopening Buder Elementary School, specifically, is to enable black City students to attend integrated schools (in the County) now and in the future.

The State's duty to reimburse Ritenour's costs was fixed in 1983, when Ritenour and the other County school districts agreed in the Settlement Agreement to accept transfer students, and thereby to assist in remedying the State's constitutional violations, *upon the condition* that their future costs of accepting students would be reimbursed. The county districts then

went *forward* in providing integrated learning opportunities for black City students. It is the cost of those forward-looking remedial steps, not anything that occurred in the past, for which Ritenour sought state reimbursement in its budget request under Section X.B.3. of the Settlement Agreement.

Even Ritenour's pre-request expenditures for roof repairs — which were incurred *after* the Settlement Agreement had been approved and *after* Ritenour had committed itself to the education of black City students in such numbers as made the reopening of Buder inevitable — was plainly "prospective" for Eleventh Amendment purposes. The roof was repaired with the intent, purpose and effect of preserving the building, so that it could be reopened in the following year (at the least possible cost to the State and Ritenour) to accommodate the influx of City transfer students. State reimbursement of the roof repair was thus entirely proper under *Milliken II,* as the Eighth Circuit below correctly held.

II.

There is No Conflict Between the Decision Below and the Sixth Circuit's Decision in *Kelley v. Metropolitan Board of Education of Nashville and Davidson County*, 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 2848 (1988).

The St. Louis school desegregation case is fundamentally different from the case considered by the Sixth Circuit in *Kelley v. Metropolitan County Board of Education of Nashville and Davison County*, 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 2848 (1988).[11] Unlike the State of Tennessee in *Kelly*, the State of Missouri was an adjudicated constitutional violator (along with City Board) from the very outset of the remedial phase. It was subject to direct, substantive remedial orders from day one. Paragraph 12 of the district court's 1980 order directed the State of Missouri to implement a voluntary student transfer plan with the cooperation of the St. Louis County school districts. The State participated in the negotiations that culminated in the establishment of just such a program. The State was thereafter ordered in a string of court decisions (no longer subject to review) to *implement* and *fund* the transfer program. The State's payment to Ritenour is indisputably part and parcel of that transfer program.

Kelley involved a third-party complaint filed by the Metropolitan Board of Education of Nashville and Davidson County ("Metropolitan Board") against the State of Tennessee. In stark contrast to the decision below, Tennessee had not

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[11] Moreover, the case at bar would be a particularly inappropriate vehicle to address a purported conflict with *Kelley* because neither the *Kelley* decision nor the particular analysis advanced therein is discussed in the opinion below.

previously been a party in the case.[12] *Kelley,* 836 F.2d at 989. The Metropolitan Board sought "indemnification" from Tennessee for the Board's costs of desegregation remedies that it had been ordered to carry out as far back as 1971. *Id.* at 987 & 1000. The remedial programs for which Metropolitan Board sought state reimbursement had already been put into effect, long before the attempt was made to bring Tennessee into the case. *Id.* at 989-90. The Sixth Circuit found that the monetary sums sought from Tennessee were purely "retroactive" and not "ancillary" to any affirmative injunctive relief ordered against the state, and that payment thereof would therefore violate the Eleventh Amendment.

The procedural posture in *Kelley* thus differed in critical respects from the present case. The State of Tennessee, unlike the State of Missouri, was not even in the case at the time the remedies were implemented for which the "indemnification" was sought. Furthermore, the Sixth Circuit emphasized in *Kelley* that there was no evidence supporting any current constitutional liability on the part of the State of Tennessee, which is the antithesis of the State of Missouri's status in the case at bar. *See* n. 12. The two cases are thus plainly distinguishable, and no conflict exists between them.

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[12] It is not at all clear from the opinion whether the Sixth Circuit even considered Tennessee to be a constitutional violator in the case:

> It bears emphasis that we are not here called upon to adjudicate the rights of plaintiffs suing to obtain the equal educational opportunities promised them in *Brown v. Board of Education*. . . . Those plaintiffs have long since won their case. They won it *without ever having asserted any claim against the state.*

Kelley, 836 F.2d at 989 (emphasis added); *see also id.* at 993 ("we have searched the record of this case in vain for any demonstration that the integration of metropolitan Nashville's schools has been wrongfully impeded by anything the state has done, or has failed to do, in the 1970s or 1980s") & at 995 ("the record in this case simply does not show that the State of Tennessee is currently a participant in any constitutional violation").

III.

The State's Duty to Fund the Voluntary Transfer Program Is Settled "Law of the Case" in the Courts Below and Should Not Be Subjected to Reexamination

The Eighth Circuit has on four prior occasions upheld the validity of the State's duty to fund the voluntary student transfer program. *See Adams, Liddell II, Liddell V & Liddell VII, supra.* In *Liddell VII,* the State's Eleventh Amendment argument was expressly considered and rejected, and the State's certiorari petition was denied by this Court. Moreover, *Liddell V* and *Liddell VII,* in each of which certiorari was denied, explicitly held that the law of the case doctrine applied and barred the State's further attempts to relitigate the funding issue. The same salutary policies underlying that doctrine call for this Court's denial of the State's present petition. "[W]hen an issue is once litigated and decided, that should be the end of the matter." *United States v. United States Smelting, Refining and Mining Co.,* 339 U.S. 186, 198 (1950).

Reversal of the long-settled determination that the State is obligated to fund the transfer program would have serious adverse consequences for the desegregation remedy in place in St. Louis. If the State were no longer obligated to fund the transfer program, the County school districts, under the express provisions of Section X of the Settlement Agreement, are no longer obligated to accept and educate transfer students (nor would they have the resources to do so). Thousands of black City transfer students who have found a "home" in the County schools would stand in jeopardy of not being able to complete their education in those schools. The program that is widely regarded as the most successful element of the St. Louis school desegregation remedy would in all likelihood come to an end. For compelling reasons of fairness and repose, the State's settled duty to fund the voluntary City-County transfer program should not be subjected to reexamination.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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